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Anticompetitive Effects of the Proposed AT&T Comcast Merger

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1. INTRODUCTION

We have been asked by counsel for Qwest to analyze the competitive effects of Comcast's proposed acquisition of AT&T Broadband. In this report we explain the economic basis for our conclusion that, if allowed to proceed, this consolidation can be reasonably expected to result in significant reductions in both the quality and quantity of multichannel cable (and satellite) video programming and, in partial consequence thereof, significantly restrain the effectiveness of competition in multichannel video program distribution. In addition, it can be reasonably anticipated to have similarly significant anticompetitive effects in terms of broadband Internet content and service, reducing outputs along economically relevant performance dimensions as well as limiting platform competition.

For these reasons, we think that the proposed merger should be challenged by both the government's competition and public-interest regulatory authorities. If the consolidation were allowed to proceed, it should be conditioned by meaningful competitive safeguards and accompanied by substantive changes in regulatory policy to stimulate increased competition and mitigate the likely significant anticompetitive effects of the merger.

2. ECONOMIC FAILURE MODES

Local cable system operators currently exercise significant market power in both the supply of MVPD service to residential customers (*i.e.*, customer access to video program channels) *and* the demand for video program channels for distribution to residential subscribers (*i.e.*, video program channel supplier access to residential customers).[2] This market power has led to a substantial lessening of consumer welfare; in particular:

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[2] In their scholarly treatise on *Public Policy Toward Cable Television* (MIT/AEI Press, 1997), Professors Thomas W. Hazlett and Matthew L. Spitzer survey what they (at 2) characterize as "the overwhelming evidence that cable operators enjoy considerable amounts of market power," and note (at 25) that attempts to "explain away" evidence of the cable industry's market power by attributing it to monopsony power [*i.e.*, the exercise of market power as a buyer rather than a seller] do "nothing to diminish the market power estimate" but instead raise "the specter of a double-edged monopoly position." In Congressional testimony subsequently cited in the legislative history of *The Cable Television Consumer Protection and Competition Act of 1992*, the Consumer Federation of America's Gene Kimmelman observed that "*Cable operators who control access to a large part of the viewing public...can extract consessions from programmers* who desperately need to reach a large audience. Because they have market power over consumers, *the MSOs pocket these concessions as excess profits*, rather than passing them through to
(footnote continued)

- Consumers pay more for cable television than they would pay if the industry were more competitive;
- The quality of programming would be higher if the cable industry had less market power in bargaining with program suppliers. That is, cable programming would be able to attract more and better creative resources;
- Cable operators are already beginning to squeeze Internet service providers ("ISPs") as a consequence of their emerging dominance in broadband Internet access.

These competitive problems exist, notwithstanding a decade of efforts by public policymakers to deal with them—efforts that have been resisted at every step by the powerful cable lobby.

The key issue in examining the proposed merger is not whether competitive problems exist in the markets that the merged firm will service. That is incontrovertible. The issue is whether the merger will make these already serious competitive problems worse. Our contention is that the merger will, indeed, make the already bad situation worse.

A substantial consolidation of local cable system ownership, as in the instant case, can be reasonably expected to increase market power *vis-à-vis video programming suppliers* significantly, leading directly to reductions in the output *of video programming.* A consequence of this output reduction will likely be a significant lessening of actual and potential competition *in the market for subscriber access.*

One of the economic mechanisms by which consolidation of system ownership produces these untoward results is what economists refer to as "free riding"—attempts by system operators to enjoy the economic benefits of distributing various program channels, whose production

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consumers. They *exercise their monopsony power vis-à-vis programmers* and their monopoly power *vis-à-vis* consumers. *See S. Rep. No. 102-92 at 33(1991)* (emphasis added). In 1998, the then Chairman of the Federal Communications Commission ("FCC") observed that "...it is clear that broad-based, widespread competition to the cable industry has not developed and is not imminent." In its subsequent assessments of MVPD markets' competitive status, the FCC has found that cable television continues to be the primary delivery technology for the distribution of multichannel video programming and continues to occupy a dominant position in the MVPD marketplace. *See* Separate Statement of Chairman William E. Kennard *In the Matter of Annual Assessment of the status of Competition in Markets for Delivery of Video Programming*, January 13, 1998. *See* also, FCC, *In the Matter of Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming* (report released annually). Both structural (concentration) and performance (q-ratio) indicia indicate that cable system operators exercise very substantial market power—indeed, amongst the highest measures of monopoly power *anywhere* in the enterprise economy.

involves high fixed costs and very low variable costs,[3] while minimizing the economic contribution to recovery of fixed costs of production. This kind of free-riding undermines support for provision of quality programming and generally produces a tendency toward economic *under*-provision—output of the good (in this case, programming) *falling below* economically efficient levels along various relevant performance dimensions.[4]

Program channel suppliers incur a variety of fixed and variable costs. The "first-copy" costs of producing programs constitute an important fixed cost. Economies of scale result from the spreading of these fixed costs over larger numbers of subscribers. The existence of these economies means that a network's marginal costs of delivery to a system operator are below its average costs. This implies that the channel supplier must, on average, collect revenues *above* its marginal/variable costs to recover its fixed program production costs. If it cannot, it must reduce expenditures on programming, reducing the quantity and quality of its offerings and perhaps even threatening a channel's economic viability.[5] If free-riding by a multiple system operator ("MSO") forces input prices below their average costs of production, the flow of subscriber revenues to the program production industry will be significantly constrained, thus reducing the supply of quality programming.

In addition to these adverse effects on program outputs, free riding will also restrain platform competition as suppliers of competing access platforms confront higher prices for program channel inputs. In particular, if buyers with substantial market power pay virtually none of the fixed costs of programming, remaining buyers will have to pay virtually all the fixed costs. The remaining buyers will, therefore, operate at a competitive disadvantage. Remaining buyers in this case include all other distributors of video programming. These now include suppliers of direct broadcast satellite ("DBS") service and in the future might include suppliers of video programming to broadband Internet users.

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[3] In economic terms, programming has the character of a (quasi-) public good. An economic public good is characterized by "non-rivalry in consumption" and "non-exclusion." *See* Edgar K. Browning and Jacquelene Browning, *Microeconomic Theory and Applications* (Boston, 1983), at 536-37. Non-rivalry in consumption means that, *with a given level of production*, consumption by one need not diminish the quantity consumed by anyone else. Thus, if one (multiple) cable system operator contracts for carriage rights to a particular program channel for the local markets its serves, that does not leave "less" of the channel for another to distribute in the markets it serves. Non-exclusion means that it is prohibitively costly to confine the benefits of a good (*once-produced*) to selected persons. Thus, a person can benefit from production of the good regardless of whether he or she pays for it. While cable system operators cannot literally benefit from distributing a program channel without acquiring permission to do so, as we shall see, program channel suppliers may, nevertheless, not be in a position to charge much, if anything, for carriage rights.

[4] Thus the frequently heard remark: "There may be 100 channels, but there is still nothing on!"

[5] Lower quality programming will attract smaller audiences and produce less advertising and subscription revenue.

As differentials in monopsony power develop as a result of the proposed system consolidation, less powerful competitors will operate at an increasing disadvantage relative to their dominant counterparts in terms of prices and other conditions of access to program channels. The effective exercise of monopsony power will enable the dominant MVPD operators to "raise their rivals' costs"[6] and, in this manner, restrain platform competition with anticompetitive effects in both multichannel video and broadband Internet access markets.[7]

3. MONOPSONY POWER AND FREE RIDING

In their scholarly treatise on *Vertical Integration in Cable Television*,[8] Professors David Waterman and Andrew A. Weiss explain how an MSO with bargaining power

> ...can become a free rider on the contributions of other cable systems to the first copy costs of [program] production. The essence of the free-rider problem is that a *price-making MSO* ignores an externality effect that its localized exercise of monopsony power imposes on other cable operators, whose profits will fall with the decline in attractiveness of programming that they can offer to consumers...Monopsonistic reduction of input prices in some markets would *reduce the quality and quantity of cable programming in all markets* and as a consequence program diversity and the access of programming suppliers to subscribers.[9]

[6] *See* S. C. Salop and D. T. Scheffman, "Raising Rivals' Costs," *American Economic Review* (1983).

[7] Rivals' costs may rise in absolute terms as well as relative to the dominant firms' costs of acquisition of program channel carriage rights. Program channel suppliers and MVPD operators generally negotiate to determine terms and conditions of carriage. Results may be expected to vary depending on the relative bargaining power of the negotiating parties. The relative bargaining power of less powerful system operators and new competitive platform suppliers declines with increases in the relative bargaining power of the more powerful system operators, whose monopsony power is enhanced by a consolidation of system ownership. Declines in relative bargaining power may easily result in higher prices, both in *absolute terms* and relative to those charged the more dominant operators.

[8] (MIT/AEI Press, 1997), at 74-86.

[9] *See op. cit.*, at 74-76 (emphasis added). The system operator exercising monopsony power thus reaps 100 percent of the resultant cost savings, while the adverse consequences of reduced programming outputs are borne in large part in *other* markets. Note that, were there a "leviathan" MSO so large that its customers *would* bear the bulk of the burden (in terms of adverse consequences) of a reduced supply of programming, these external effects might be internalized to some extent—there might be other problems with the existence of such a megalithic monopoly, but free riding would not likely be one of them. No MSO in the U.S. possesses a share of the subscriber base nearly sufficiently large to make such altruism economically plausible. Even the largest, including a consolidated AT&T Comcast, would leave the bulk
(footnote continued)

Waterman and Weiss note that, "if a particular MSO were to force the input prices of a number of networks below their average costs of distribution, *the flow of subscriber revenues to the production industry could be significantly constrained*, thus reducing the supply of programming."[10] In addition, as we have noted, creation of marked differences in terms and conditions of access to important program channel inputs would raise entry barriers against competition in the supply of MVPD and broadband access platforms—competition that is a critical premise underlying the government's heretofore light-handed regulation of cable broadband offerings and access thereto.

4. MONOPSONY POWER AND RENT EXTRACTION

On the downstream side, the relevant market is the individual community. The great majority of these relevant markets are each served by only one cable company. Alternative terrestrial suppliers of multichannel video programming are not widespread and do not constitute a viable competitive threat to cable. Direct broadcast satellite ("DBS") provides some competition at the high end, but not for customers who simply want a standard service. Indeed, the high fixed cost of DBS (per subscriber) makes it suitable primarily for the high end of the market. The number

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of any adverse effects on the supply of programming to be borne by other systems' customers. According to Waterman and Weiss (at 84), "It is reasonable...that MSOs within a certain size range would have *both the incentive and the ability* to force inputs prices, and thus the supply of programming, below a socially optimal level." They (at 154) suggest "that an MSO having a national market share *well below 30 percent* could exert *significant monopsony power* over *many* cable networks" (emphasis added). A consolidated ATT/Comcast would have about 32 percent of all cable subscribers, and about 26 percent of all MVPD subscribers. The industry structure in this instance is thus almost *precisely* that hypothesized in the professional literature as conducive to a competitive market failure based on free-rider behavior. *See* FCC, *Eighth Annual Report on the Status of Competition in the Market for the Delivery of Video Programming*, FCC 01-389, CS Docket No. 01-129, January 14, 2002, Table C-3.

[10] Waterman and Weiss (at 75) offer this illustrative example:

> Assume, to illustrate, that a cable network just covers its total production costs of $1,000 by collecting $10 each from individual cable systems in 100 separate local markets and that the marginal costs of delivering the network by satellite are zero. If the cable systems in ten of those markets formed an MSO and made a credible threat to refuse carriage of the network, it would still be worthwhile for the network to make a deal as long as it could get at least some amount over its $0 marginal cost from the MSO. If the MSO managed to exert that bargaining power over a number of networks, either they would all have to reduce their production costs, or some would have to exit the market, which would reduce the supply of programming available to all other cable markets.

of DBS subscribers is therefore far less than the number of cable subscribers. For all these reasons cable has a dominant position on the downstream side of the market.

Market power is more complex to assess on the upstream side of the market. We address that issue by first examining the case in which program suppliers are assumed to be atomistic.[11] We then consider the more realistic case in which some program suppliers may possess some market power of their own.

If programmer suppliers were atomistic, each cable company, because of its dominant downstream position, would be able to extract virtually all the rents from every program supplier. Rents in this case include not only the profits of the direct program suppliers; they also include premiums that such suppliers must pay to attract high-quality creative resources. The dominant cable company could simply offer each programmer the choice between a modest profit in the particular local market or no profits at all in that market. Furthermore, the deal could require the direct supplier to cut back on its expenditures for creative resources in order to cover costs. If a particular program supplier balked, plenty of others could be expected to compete to fill the channel capacity.

The outcome in this model is the precise opposite of the efficient outcome. Efficiency requires that all economic (scarcity) rents go to the upstream suppliers of creative talent and the cable company earn only a competitive rate of return. Economic rents to creative resources are necessary to induce an optimal supply of those resources. Monopoly rents to cable companies (indeed, monopoly rents, in general) have no comparable socially desirable consequences.[12]

In reality, the problem may be even worse. The cable monopsonist may be able to extract not only the rents, but also the returns from fixed costs (quasi-rents). The monopsonist can reason that such costs are bygones and need not be considered in the bargaining process. It need only offer a deal that is marginally profitable on a forward-going basis. Such extraction has a chilling effect on any expenditures by program suppliers at all. Why spend money to produce quality programming when the returns will simply be expropriated by the cable monopsonist? Returns from sunk costs all would be susceptible to expropriation by cable companies. In theory, programmers could negotiate contracts with cable companies in advance of sinking costs, but in practice the transactions costs of doing so with multiple cable companies would be excessive and render it effectively impractical.

In reality, program suppliers are not atomistic. Some programmers (*e.g.*, ESPN) have significant market power due to the quality of their offerings. They are, therefore, able to ward off the pessimal outcome described above, wherein the cable companies extract *all* the rents, possibly including quasi-rents. Such programmers do, indeed, have something left to lose.

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[11] Since programmers produce differentiated products, the relevant model is that of E. Chamberlin, *The Theory of Monopolistic Competition* (Cambridge, Mass.: 1962).

[12] They are, by definition, returns not needed to induce a resource to engage in a particular economic activity.

The merger of the first and third largest cable companies would significantly increase the bargaining power of the already dominant cable companies in negotiations with program suppliers that have some market power. The threat of losing carriage on all the cable systems controlled by these two firms would be extremely serious to virtually all programmers—indeed, it would generally be a death threat.[13] Because the threat is so serious, programmers would be less able to resist rent extraction. Resistance involves the cable network's threatening to withhold carriage unless it is paid a fair price. This threat would simply not be credible for most—perhaps all—program suppliers. As a result, the programmers would have no choice but to take what they are offered. They would thereby lose what they have left to lose.

What is of concern from an efficiency standpoint is the substantial decline in quality of programming that should be anticipated to follow. In economic terms the merger has the predictable effect of lessening the quality-adjusted output of programming. Furthermore, the rent shifting has other untoward consequences, as discussed below.

The percentage of cable subscribers that would be controlled by the merged firm is, of course, relevant for evaluating the consequences of the merger. It is important to recognize, however, that this number is not a "share of the relevant market" in the usual sense. The relevant markets are each local community, wherein the cable company has a dominant position.

The relevant metric in this case is the increased potency of the cable company's threat of non-carriage to individual suppliers of cable programming. One needs to consider the decrease in the ability of each supplier of cable programmer to withstand this threat and hold out for a fair price.

Examining the market is in this appropriate way, we conclude that controlling 30-some percent of subscribers is likely to have much greater consequences than controlling 30 percent of a relevant market in most other industries. Indeed, it is well known that TCI and its successor AT&T have long been able to extract substantial rents from program suppliers, while they controlled a lesser but still substantial share of total subscribers. The impact would become all the worse with the increase in bargaining power of the merged firm.

5. EFFECT OF CONSOLIDATION ON MONOPSONY POWER

Cable system operators exercise significant market power in both the output (MVPD and broadband) markets in which they operate and the market for various video program services (video "channels" or "networks"). The latter is sometimes characterized as a national market,

[13] Indeed, as AT&T Comcast points out in its application: "AT&T Comcast will have a leading market presence in 8 of the top 10 Designated Market Areas ("DMAs") and its service area will range throughout the country from Los Angeles to Philadelphia. The combined company will also pass more than 38 million homes and have a presence in 41 states. The prospective audience should be attractive to national advertisers…". *See* Declaration of Robert Pick at 12.

but it is an atypical one in that it consists of an aggregation of local (near-) monopoly markets. Local cable system operators do not usually compete with one another as either buyers or sellers.[14] In particular, cable systems acquire carriage rights for distribution of program services in individual local markets in which they typically possess a (near) monopoly/monopsony.

The particular market failure on which the government historically has focused (*viz.*, market foreclosure) conceives of individual local markets as substitutes for one another from the programmer's perspective,[15] although programmers will perhaps more typically regard local markets as productive *complements* to one another.

In this regard, a video program service confronts a situation similar to that confronted by a long-distance telephone service supplier: to provide a competitively effective service requires access to local markets throughout the country. If a long-distance provider were denied access in particular local markets, it would hardly suffice to argue that it might still make a go of it by serving a more limited set of customers who desired to make calls to a more limited set of places. A national long-distance service with "holes" in its service area (*i.e.*, areas where it was incapable of completing calls) would plainly operate at a significant competitive advantage and

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[14] For this reason, the acquisition of monopsony power by an MSO, and the market failure caused by free-rider behavior derived therefrom, has virtually nothing to do with the standard interpretations of concentration indices that are based on the potential for effective implicit or explicit collusion. Instead, the ability to alter terms and conditions of trade depends on relative bargaining strength and how bargaining strength is affected by the magnitude and extent of system ownership. *See* discussion in Waterman and Weiss at 152-57. On the importance of appropriate model selection for competition policy analysis, *see* Richard Schmalensee, "On the Use of Economic Models in Antitrust: The Realemon Case," *University of Pennsylvania Law Review* (1979).

[15] Thus, in analyzing the competitive issues raised by the proposed consolidation of Time Warner, a large supplier of cable programming and the second largest MSO, and Turner Broadcasting, another leading cable programming supplier (a consolidation also implicating TCI, from whom AT&T acquired many of its systems, the then largest MSO and a stakeholder in Turner Broadcasting), the Federal Trade Commission ("FTC") was concerned about the possibility of anticompetitive foreclosure of competing program services and adverse impacts on competition for cable. The proposed transaction would have increased levels of vertical integration and concentration of multiple system ownership. The draft Complaint prepared by the FTC remarked that, even prior to the proposed merger, local markets for distribution of cable programming were highly concentrated and that multiple system ownership would become more highly concentrated as a result of the consolidation. *See* Complaint, *in re Time Warner, Inc.*, FTC Docket No. 961-004 at ¶¶ 30-32 (1996). The FTC feared that new programming services might be unable to succeed without access to the 44 percent of cable households served by Time Warner and TCI. Taking note of the fact that the next largest MSO at the time had only a 6-percent share of households, then FTC Chairman Robert Pitofsky [the renowned antitrust legal scholar] expressed the view that a programmer who wished to assemble a sufficiently large combination of the small systems to meet what he described as a 40- to 60-percent threshold required for the successful launch of a new network would face a difficult task and the threat of foreclosure was, therefore, real and substantial. *See* Separate Statement of Chairman Robert Pitofsky, *In re Time Warner, Inc.*, FTC Docket No. 961-004.

often not provide a competitively effective service. Similarly, the ability of a video program service to realize economies and compete effectively typically depends on the ability to reach a large audience.

If, for example, a program channel were prevented from delivering its service to the eight of the ten largest DMAs that would be covered by the consolidated AT&T Comcast ownership, the quality of its advertising "avails" would be substantially degraded and would presumably need to be significantly discounted to be economically worth purchasing. Thus, in addition to a stunted ability to spread costs of program development and production over a larger audience size, a program service operating under this type of handicap on the quality of the one of its principal outputs (*viz.*, advertising availabilities) will find its advertising-revenue-generating capability degraded.

The government's concern has been the ability of MSOs which control a significant number of systems to affect the economic viability of program services and in this manner limit competition.[16] Consider the plight of a program service trying to assemble a national audience for sale to advertisers seeking an economically and transactionally convenient national buy. Holdouts by MSOs, controlling access to a large number of viewers, could compel significant

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[16] The government has worried that vertical integration by cable system operators into programming supply may afford the incentive and ability to restrict rival programmers' as well as competing video program distributors respective access to distribution and programming in an anticompetitive manner. *See* FCC Report, *In re competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, MM Docket No. 89-600, ¶ 21 (released July 31, 1990) and S. Report No. 102-92 to accompany Cable Television Consumer Protection and Competition Act of 1992, at 24, 33 (1991). Waterman and Weiss (at 55) remark that:

> A possibility of particular policy interest is that an MSO-network combination will use its cable system ties anticompetitively to disadvantage existing or potential network rivals by foreclosing them from access to the cable subscribers it controls. A second possibility is that such a combination will use its network ties strategically to create barriers to entry or otherwise disadvantage alternative multichannel video programming distributors by denying them access to the programming it controls.

Waterman and Weiss (at 66) note that the power to foreclose also implies the ability to force down the license fees that an MSO pays to networks and cite anecdotal evidence suggesting the possibility that larger MSOs hold significant monopsony power in the programming market. The evidence they cite includes a 1988 National Telecommunications and Information Administration report on the cable industry (*Video Program Distribution and Cable Television: Current Policy Issues and Recommendations)* that notes the existence of large programming input price differentials for large versus small MSOs, econometric evidence (Tasneem Chipty, "Horizontal Integration for Bargaining Power: Evidence from the Cable Television Industry," 4 *J. Econ. Mgmt. Strategy* 375, 1995) suggesting that larger MSOs exert monopsony power over programming suppliers, and persistent complaints by independent cable system operators to the FCC that they pay greater prices for program channel carriage rights than the major MSOs.

discounting to advertisers to offset disabilities in terms of audience coverage and convenience, and may render the service non-viable. In this circumstance, system operators possess considerable leverage in negotiations over carriage.

A different type of monopsony failure mode stems from the incentive of cable system operators to behave as economic free riders in acquiring program channel carriage rights.[17] Cable system operators acquire carriage rights for distribution of program services in particular local markets. Program services generally confront a near monopoly in each individual market; *i.e.*, they lack alternative means of distributing product to the cable subscribers in each market. As a consequence, the cable system operator in any given market possesses bargaining power in acquiring carriage rights for different program services. The amount of such bargaining power—and thus the ability to force the prices of program channel inputs downward—generally increases as the number of systems controlled by an MSO increases.

The directly anticompetitive consequences of the proposed consolidation of system ownership in the instant case derive from the significant enhancement of monopsony market power it would produce. The combined entity will be in a significantly stronger position to demand and extract more favorable carriage terms and conditions than either AT&T or Comcast would be able to achieve bargaining individually.[18]

The bargaining threat is "Unless you agree to my terms, you may forego carriage in *one-third* of the country" (*i.e.*, Do what I say, or else."). The credibility of that "extortionate" threat, of course, depends not just on the system operator's actual control of one-third of the country's subscribers, but also a program channel's bargaining position. While some channels (say, ESPN) may possess some bargaining power (based, in ESPN's case, on the market power of the

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[17] The free-rider monopsony model differs from the standard "textbook" model of monopsony in that it does not depend on the assumption that marginal input costs rise with increases in supply; instead one may assume that the supply of programming channels is perfectly elastic. As Waterman and Weiss (at 85) explain, "The basic incentive to exercise monopsony power in the free-rider model arises because the average cost diverges from the marginal cost of input distribution and because a geographically localized firm does not bear the full burden of input price reductions."

[18] *See* "The Bigger Picture: Why the Possible Sale of AT&T Broadband Spooks 'Content' Firms—Disney and Others Are Facing Prospect of Losing Power to Fewer, Larger Systems—'The Zeros Are a Lot More,'" *The Wall Street Journal* (8/27/01), at A1 ["A sale of AT&T Broadband to one of the other giants, such as Comcast or AOL Time Warner, would create *an unprecedented cable behemoth* with as many as 22 million subscribers, or nearly one-third of the 69.5 million cable subscribers in the U.S. today…Theoretically, fewer, larger cable operators could strong-arm content companies into offering better terms—and then pass the saving along to subscribers, or simply pocket them. That's only one of several unsavory prospects for content companies. Many also fear that getting on the wrong side of a big cable operator could cost them access to millions of homes, not only for their TV programming, but also for their Internet and interactive TV offerings. And they worry that it will be more difficult to launch new and untested channels."]. (Emphasis added.)

professional sports leagues it carries), in general, system operators have many more and better alternatives than program channel providers, whose carriage alternatives are few and of limited effectiveness—few subscribers, for example, maintain *both* satellite and cable connections. This implies that system operators are well positioned to extract any (quasi-) rents, and that the largest MSOs will extract most of these in the normal course of events.

There can be only two consequences of the resultant increase in buyer market power: if the consolidated entity is empowered to extort a better deal and contracts to pay less, either others must pay more or the supply of programming must be attenuated as productive incentives are degraded—most probably *both*.

Note that the power conveyed by increased control of access to subscribers may, via the same and related market failure modes, lead to competitive failures in other types of information/software content as well, including, notably, various types of interactive and Internet-based broadband content. The "hardball-playing" MSO may well enhance its ability to extract rents and restrain the success of rival content through *expanded* control of a larger *number* of subscribers that strengthens its monopsony power and attendant ability to free-ride.

While some previous consolidations of cable system ownership have been conditioned by requiring a modicum of "open access," the government has heretofore been reticent to intervene strenuously in this line of commerce, fearing adverse consequences for investment incentives, and looked instead to effective platform competition to produce efficient results. The ATT/Comcast consolidation promises, however, to thwart the evolution of effective platform competition, an issue to which we later turn.

6. MONOPOLIZATION IMPACTS

In his price theory textbook[19]—and we would be hard pressed to think of a more conventional economic reference—economics Nobelist George J. Stigler notes that:

> Occasionally superior qualities of natural resources occur in such small quantities that a major barrier to the expansion of the industry is provided by the unavailability of other good sources.

If two sellers are selling apples or nails or access to television programming and one can acquire these for less than the other, the effectiveness of competition between the two will be limited. While Stigler is quick to point to the "almost always subsequent discoveries" of comparable or even higher-quality (mineral) deposits, there may well exist opportunities to engage in strategic behavior that has the effect of artificially "raising rivals' costs" and, thereby, disabling their competitive effectiveness.

[19] *See The Theory of Price* (New York/London, 1966), at 225.

If consolidation of cable system ownership enables the largest owners to extract more favorable terms and conditions for channel carriage, effectively lowering their costs of production while raising in both relative and absolute terms the costs of would-be rivals, entry barriers will be erected to new competition by other competitors (say, telephone companies, to take one possible example). Yet competition is putatively what the government is looking for to exert effective market discipline and mitigate the need for intrusive regulations of MVPD and broadband offerings. The economically perverse result of consolidation would be that consolidated ownership would increase *both* its monopsony and its monopoly profits.

7. THE MERGER IS LIKELY TO UNDERMINE THE TRANSITION TO DIGITAL TELEVISION

The increased monopsony power created by the proposed merger could also harm broadcasters and potentially undermine the transition to digital television. In the first place, AT&T Comcast will have much greater bargaining power with the broadcast networks over terms of carriage of their local affiliates.[20] In the analog context, the networks (and indeed all local station owners) have recourse to elect "must-carry" status if they are not able to agree on terms of carriage. This option was created by the Congress explicitly to help neutralize cable's advantage in bargaining power.[21] This was intended to help "weaker stations" that lacked the more attractive programming of a major network station.

The proposed merger will weaken the relative bargaining position of broadcasters as AT&T Comcast's monopsony power is enhanced. The negative impact will likely be even greater on the new digital program offerings being developed by broadcast networks precisely because the Commission has chosen not to require "digital must-carry." This means that AT&T Comcast will have even greater bargaining power when negotiating terms for carriage of digital signals with the result that here, as with cable networks generally, broadcasters will find it even more difficult to recover the costs of their investments in digital program services and, therefore, slower to roll out the very offerings that the Commission has simultaneously mandated.[22] The harms are disproportionately great for those households which rely on over-the-air reception and may thus lose the option of digital television altogether.

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[20] Bargaining for carriage of the signals of local owned stations (and in some cases for affiliated stations) is typically done at the network/MSO level. Cable MSOs are required to obtain "retransmission consent" before carrying any qualified local broadcast signal.

[21] As with non-broadcast video channels, broadcasters lack good carriage alternatives while system operators generally have a plethora of channel alternatives from which to choose.

[22] The economics of the transition to digital broadcasting are daunting to begin with, since broadcasters can expect little or no additional advertising revenue given the lack of penetration of digital sets and the limited prospects for *increments* in audience size.

8. INCREASED LIKELIHOOD OF FAILURES IN BROADBAND INTERACTIVE AND INTERNET CONTENT/SOFTWARE

The proposed merger will have adverse consequences for newly emerging broadband interactive and Internet markets as well as for traditional cable networks and broadcasters. These harms are of two types:

1) The merger will give the new entity even greater bargaining power with independent ISPs. In entering into agreements with unaffiliated ISPs today, cable companies typically extract a large share of both subscription and ancillary revenues generated by the ISP.[23] While some costs incurred by independent ISPs are scalable, many are not, including, perhaps most importantly, those associated with development of software and proprietary content. The lessened ability/inability of independent ISPs to recover these types of costs will clearly weaken their ability to compete effectively. AT&T Comcast benefits, but competition is harmed, by reducing independent ISPs to the status of "dumb portals."[24]

2) The merged entity can more easily restrict new content applications, especially those that rely on broadband Internet connections. Given the fact that cable has already established a dominant position in the broadband Internet access market and that cable modem service is potentially more widely available than its primary competitor DSL, developers of new broadband content run the same risk of being squeezed as cable and broadcast networks. If these developers cannot realize the economies of scale that come about through widespread distribution of their products and services, they may never enter the market. This has implications not only for content quality, but also for content diversity.

If the combined entity's market power is left unchecked, genuine threats are posed to the openness of the broadband Internet. Cable has typically employed a closed-access model for the distribution of multichannel video programming. If AT&T Comcast were successful in extending this model and their near-monopoly market power into the competitive market for the provision of Internet services, there would be a substantial loss to the economy and to society.

We emphasize that this merger, if not blocked, will increase AT&T Comcast's monopsony power and permit an extension of market power into developing markets. In the absence of

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[23] Mark Cooper (at 37) reports that this ranges up to 75 percent of subscription revenues and 25 percent or more of ancillary revenues. *See The Failure of 'Intermodal' Competition in Cable Markets*, Consumer Federation of America/Consumers Union (April 2002).

[24] Cooper (at 36) points to a number of other concessions that are extracted by cable companies from independent ISPs, including restrictions on streaming video and other "end-user generated content and applications" that may compete with cable's core video service offerings." *Ibid.*

some ameliorative regulatory and deregulatory reforms[25] (which the FCC has, heretofore, been reluctant to adopt), the merger will enlarge expected economic welfare losses from the exercise of monopoly/monopsony power and make these harms more likely to occur.

9. AT&T'S HIGHLY POROUS "DEFENSE"

In recent Congressional testimony, AT&T Chairman and CEO C. Michael Armstrong tried to explain why the proposed merger "will cause no competitive harm and have no anticompetitive effects in any relevant market."[26] Every one of his purported explanations is economically erroneous and invalid.

According to Armstrong, monopsony-based market failures have "no applicability in the present case" because, allegedly, "companies can only exercise monopsony power over goods that, when sold to one buyer, cannot sold to another buyer."[27] This is simply false.[28] Non-rivalry in consumption in no way precludes a buyer from exercising and benefiting from the exercise of market power. Carriage rights for program channel distribution in particular markets are established via negotiations between the buyer and seller. If a powerful MSO can free-ride by credibly threatening to withhold carriage, and the result is to force the input price below average costs of production, "the flow of subscriber revenues to the production industry [will] be significantly constrained, thus reducing the supply of programming."[29]

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[25] In a 1999 paper prepared for the OpenNET Coalition, Shooshan, Temin and Weber proposed an approach to "open broadband access" that could be implemented "without the need for intrusive regulation and without dampening incentives to invest on the part of cable operators or other network providers." They noted that "[t]he key is a policy that ensures nondiscriminatory interconnection and equal access to all information providers." *See MaCable.com: Closed v. Open Models for the Broadband Internet*, Strategic Policy Research (October 15, 1999). We note that the FCC's policy of leaving cable unfettered while imposing intrusive regulation (*i.e.*, "deep unbundling") on telco broadband offerings (based on the mistaken premise that keeping telco broadband open would serve as a check on cable) has not produced the competition the Commission has posited as the premise for light-handed regulation of cable. Indeed, this failed policy has instead simply facilitated cable's rapid achievement of an economically dominant position in the broadband Internet access market.

[26] From our perspective, the title of Armstrong's remarks was entirely apposite, if somewhat oxymoronic (*cf.* "cable competition"): *Dominance on the Ground: Cable Competition and the AT&T-Comcast Merger*, testimony before the United States Senate Committee on the Judiciary, April 23, 2002.

[27] *See Id.*, at 8.

[28] It will be interesting to see if AT&T can find an economist willing to make this argument and, assuming they can, what his/her argument will be.

[29] *See* Waterman and Weiss, at 74-75. Note that this result is not affected by the existence of quasi-rents in program supply. Extraction of quasi-rents via threats to terminate carriage reduces expected returns to
(footnote continued)

According to Armstrong, "video programming can be consumed by an unlimited number of buyers."[30] As we have noted, video programming possesses the characteristic of "non-exclusivity in consumption," but it can be consumed by an *unlimited number of buyers* only if there *are* an unlimited number of buyers. Far from "an unlimited number of buyers," in local MVPD markets cable system operators are near *monopolists*. Thus, contrary to Armstrong's assertion that "AT&T Comcast will account for less than 30% of total purchases,"[31] AT&T Comcast will typically account for roughly *80 percent* of total purchases in the particular local markets in which it operates.[32]

Contrary to Armstrong's assertion that AT&T Comcast's "less than 30%" share "is not remotely enough to give it buyer market power,"[33] economic analysis reveals that:

> Under reasonable assumptions, an MSO having a national market share *well below 30 percent* could exert significant monopsony power over *many* cable networks.[34]

Armstrong claims that cable operators face "intense competition from DBS and others at the retail level," and "would choose the same quantity and quality of programming as a competitive, 'non-monopsonist' purchaser.[35] There is "overwhelming" economic evidence[36] that DBS

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future program investments and, in this manner, reduces incentives to invest in program production and the supply of program channels.

[30] *See op. cit.*, at 8.

[31] *Ibid.*

[32] The observations of Jean-Jacques Laffont and Jean Tirole are germane in this regard:

> It is worth recording here the *common fallacy that small players do not have market power and should therefore face no constraint on their termination* [*i.e.*, upstream] *charges*. This fallacy results from a misunderstanding of the definition of a market. A network operator may have a small market share in terms of subscribers; yet it is still a monopolist on the calls received by its subscribers (emphasis in original).

See Competition in Telecommunications (MIT, 2000) at 186. Neither AT&T nor Comcast are "small players" in terms of their respective share of total subscribers, and they each control a very *large* share of the *local* markets in which they operate—they may account for 30 percent of the demand in 100 percent of the markets, but they account for 100 percent of their own subscribers' demands (*i.e.*, about 80 percent of the residence customers in each local market, on average) in the roughly one-third of the total number of markets they serve.

[33] *See op. cit.*, at 8.

[34] *See* Waterman and Weiss, at 154 (emphasis added). The anecdotal evidence presented by these authors and others amply confirms this hypothesis.

[35] *See op. cit.*, at 8.

competition is not an effective constraint on cable's market power. Notwithstanding the recent downward revisions in asset values (on an economy-wide basis), q-ratios for the cable industry remain among the highest in the economy, several times the competitive norm of one as well as the economy-wide average.[37] Were the market to judge DBS an effective constraint on cable system operators' market power, q-ratios would decline toward a value of one. They display no such tendency.[38]

Contrary to Armstrong's unsupported assertions about cable operators' programming choices, an economically rational operator may possess both the incentive and ability to "become a free rider on the contributions of other cable systems to the first-copy costs of production":

> The essence of the free-rider problem is that a price-making MSO *ignores an externality effect that its localized exercise of monopsony power* imposes on other cable operators.[39]

The monopsonist rationally suffers a decline in the attractiveness of programming because it suffers only in proportion to its share of the national market ("less than 30% of total purchases") but reaps *100 percent* of any cost savings or other benefits in the terms and conditions of carriage it can extract through brinksmanship.

Armstrong claims that AT&T Comcast would lack the incentive and ability to foreclose unaffiliated programming because its programming interests are "modest" and unaffiliated programmers possess alternatives.[40] In so doing, he commits "the common fallacy" remarked

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[36] The adjective is Professors Hazlett's and Spitzer's. *See op. cit.*, fn. 2, *infra.*

[37] There have been a variety of attempts to rationalize high cable q-ratios in terms other than market power. Many of the suggested caveats are not applicable in the cable case and, even when downward adjustments are made, cable q-ratios remain high. *See* Hazlett and Spitzer, *op. cit.,* at 24-25 ("Attempts to explain away the cable industry's exceptionally high q-ratio are thus uncompelling.") and Jeffrey H. Rohlfs, "Opening the Broadband Gateway: The Need for Telephone Company Entry into the Video Services Marketplace, Rebuttal to the *Comments* of Tele-Communications, Inc.," Washington, D.C., January 20, 1998. ("As a general proposition, it is true that estimates of q reflect subjective judgments and can vary, depending on those judgments. However, the monopoly/monopsony profits of the cable industry are so large that they can be detected by any reasonable procedure for calculating the q ratio.")

[38] Cable's entry into provision of broadband Internet access is sometimes cited as a source of the industry's persistently high q-ratio; the q-ratio measures anticipated *rents* rather than revenues. Under an effectively competitive industry organization, a firm with growing revenues will still display a q-ratio tending toward the competitive norm.

[39] *See* Waterman and Weiss, at 75.

[40] *See op. cit.,* at 8.

above.[41] In the local markets controlled by AT&T Comcast, programmers possess, at best, *very poor* alternatives to reach the consolidated firm's subscribers. If we suggested to Mr. Armstrong that he should not worry about an inability to originate or complete telephone calls in New York City because there are lots of other markets in which AT&T can originate and complete such calls, we have some notion of how he would respond. "Residences" are not necessarily or even usually genuinely economic substitutes for one another in the eyes of programmers. Selling *national* advertising "avails" does means selling exposures in only two-thirds of the country with holes in eight of the largest DMAs.

Finally, AT&T Comcast need not possess *any* programming interests in order to possess strong economic profit incentives to exercise monopsonistic market power with the consequence of potentially foreclosing particular program channels. The existence of such interests simply raises an additional concern, one that has been a serious concern of the government in the past, Armstrong's reassurances notwithstanding.

Armstrong alleges benefits in terms of the consolidated enterprise's ability to sell national advertising availabilities—these derived, in part, from AT&T Comcast's operating in eight of the largest DMAs. The market for national advertising availabilities is generally regarded as competitive. Putative benefits of the consolidated enterprise's entry into this market come at a high cost in terms of degradations in the ability of program channels to compete effectively in the market for national advertising availabilities. Through its bottleneck control, AT&T Comcast will be in a position to degrade the quality of its competitors' exposures.

10. POLICY IMPLICATIONS

The adverse consequences that should be reasonably anticipated to result from this proposed consolidation can best be avoided by challenging and preventing it from occurring. This, in our view, is the only "remedy" that can be relied upon to be fully effective in preventing the anticompetitive effects entirely to be expected. If the merger is nevertheless approved, there are several steps, albeit of likely lesser effectiveness, the government might undertake to mitigate its adverse effects somewhat. These include:

1) Reform of the current anticompetitive regulatory regime that deters broadband investments by telephone companies and, paradoxically, affords economically dominant cable operators asymmetrically favorable regulatory treatment;

2) Imposition of stringent and demanding "open access" regulatory requirements to ensure equal access to cable delivery networks by suppliers of complementary content inputs and services; and

[41] *See* the remarks of Professors Laffont and Tirole previously cited in fn. 28, *infra.*

3) Imposition of stringent and closely policed "equal access" regulatory requirements to ensure rival MVPD platform access to program inputs on economically reasonable, not unreasonably discriminatory terms and conditions.

In the latter regard, we note that current affiliation agreements between program channel suppliers and system operators generally afford significant volume discounts. Larger MSOs receive *very* substantial discounts. These discounts cannot be explained in terms of savings in marketing costs as even small systems often serve many thousands of subscribers. Similarly, billing and collection costs are typically a small part of revenues, again for even small systems. Transactions costs of contracting for carriage do not loom large and savings in such costs cannot account for the large discounts afforded the larger systems. Costs of satellite distribution to cable headends are largely fixed and do not depend very much on whether any particular cable system receives the signal. Indeed, per-subscriber marketing costs may be higher for the largest MSOs, as they typically bargain for rates, while small cable systems often simply pay off a rate card.

11. CONCLUSION

We are not sanguine about the ability of these safeguard regulations *and deregulations* to be either effectively implemented or fully effective even if implemented. This merger will reduce the market output of programming in terms of both quantity and quality and will lessen competition significantly in the business of MVPD and broadband access. For these reasons, it deserves to be challenged. If it is allowed to be consummated, the government will, at a minimum, need to take a variety of steps—some of them highly regulatory—to mitigate the competitive harms and salvage what will be left of its "competition-based" broadband policy.

STRATEGIC POLICY RESEARCH

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April 11, 2002

Received a B.A. with highest honors from the University of Virginia, where he was awarded the John R. Williams Prize as the outstanding honors graduate in the class of 1968, and M.Ph. and Ph.D. degrees in Economics from Yale University. He was a Woodrow Wilson Fellow, held a Yale University Fellowship, a Brookings Research Fellowship and is a member of Phi Beta Kappa and Phi Eta Sigma. His areas of specialization are industrial organization, regulated industries and monetary theory. He was a lecturer and teaching assistant at Yale University and an Adjunct Professor at the University of Maryland's University College.

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Prior to his six years at the FCC, he was Visiting Professor of Economics at the University of Virginia, worked as a private economic consultant and served consecutively on the staffs of the Federal Trade Commission's Bureau of Economics, the Civil Aeronautics Board's Office of Economic Analysis and the U.S. Department of Justice's Economic Policy Office. He has prepared papers and reports on a wide range of subjects including telecommunications economics and regulation as well as accounting standards, conglomerate mergers, energy policy and resources, and the OPEC cartel.

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Treasurer and Secretary, 1991-1992

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Dr. Rohlfs is a founding principal of Strategic Policy Research, Inc. ("SPR") and has been a consultant since 1983. He is an economist who specializes in the telecommunications and mass media industries. He has numerous publications, including theoretical, empirical and policy analyses.

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Prior to his career in consulting, Dr. Rohlfs spent 14 years at Bell Labs, rising to Department Head of Economic Modeling Research. While at Bell Labs, Dr. Rohlfs wrote a seminal paper on the theory of network externalities. This theory has been widely cited and applied to universal-service policy and technical standards. Dr. Rohlfs also wrote a seminal empirical analysis on optimal telecommunications pricing and rate rebalancing.

From 1979 to 1981, Dr. Rohlfs was Manager of Microeconomic Analysis at AT&T. He provided analytical support for AT&T's regulatory and public affairs efforts.

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PROFESSIONAL ACTIVITIES

Member, American Economic Association.

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TESTIMONIES

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"Analysis of Demand for Video Communication." Presented at *2nd Annual Telecommunications Policy Research Conference*. Airlie, Virginia. 1974.

OTHER CONSULTING ASSIGNMENTS FOR GOVERNMENTAL ORGANIZATIONS

Advisor to Oftel (U.K. telecommunications regulator) on a wide range of regulatory issues, 1989-2000.

Advisor to CONATEL (regulatory authority in Venezuela), 2000-2001.

Advisor to OSIPTEL (Peruvian telecommunications regulator), 1996-2000.

Advisor to Office of Utilities Regulation ("OUR"), Jamaica, W.I., on establishing a regulatory framework for the telecommunications sector, 1996-2001.

Advisor to Comisión Nacional de Telecomunicaciones—CONATEL (regulatory authority in Paraguay), 1999-2000.

Advisor to CONAM (regulatory authority in Ecuador), 1999-2000.

Advisor to Comisión Nacional de Telecomunicaciones—CONATEL (regulatory authority in Honduras), on drafting service-specific regulations for telecommunications services, 1998.

Advisor to City of San Diego, California, with regard to negotiations involving spectrum licenses, 1996.

Advisor to *Secretaria de Comunicaciones y Transportes* (Mexican telecommunications regulator) under the auspices of the World Bank and Inter-American Development Bank, 1989-1990.

Advisor to the New Zealand Treasury and Ministry of Commerce with regard to the privatization of Telecom New Zealand, 1989.

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Before co-founding Strategic Policy Research, Inc. ("SPR"), Mr. Shooshan served for eleven years on Capitol Hill. He was chief counsel and staff director of what is now the Subcommittee on Telecommunications and the Internet of the U.S. House of Representatives and was active in congressional efforts to reform the nation's communications laws.

Mr. Shooshan specializes in communications public policy analysis, regulatory reform and the impact of new technology and competition. He also advises on business strategies and market opportunities.

Mr. Shooshan is the author of numerous studies and articles dealing with various aspects of the video marketplace, including the transition to digital television and the impact of the Internet. He is one of the nation's leading authorities on telecommunications infrastructure and its relationship to economic development and to the global competitiveness of U.S. businesses.

Mr. Shooshan coordinates SPR's telecommunications and electronic mass media practice in Europe and has advised clients in the United Kingdom, Canada and the Caribbean.

Mr. Shooshan has testified before several congressional committees, before the Federal Communications Commission ("FCC") and several state commissions. He has also testified as an expert witness in litigation concerning broadcasting, cable and wireless cable, and in proceedings before the Copyright Arbitration Royalty Panel concerning satellite broadcasting.

From 1976 to 1991, he was an adjunct professor of law at Georgetown University Law Center, teaching regulation and communications law.

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER
J.D., Communications Law, 1975

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EMPLOYMENT

STRATEGIC POLICY RESEARCH, INC.—Bethesda, Maryland
1992-Present *Principal.* Telecommunications and public policy consulting services for a variety of clients in the telecommunications industry.

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SUBCOMMITTEE ON COMMUNICATIONS, INTERSTATE AND FOREIGN COMMERCE COMMITTEE, U.S. HOUSE OF REPRESENTATIVES—Washington, D.C.
1975-1980 *Chief Counsel/Staff Director.* Legislative, oversight and investigating activities relating to telecommunications.

SUBCOMMITTEE ON COMMUNICATIONS AND POWER, INTERSTATE AND FOREIGN COMMERCE COMMITTEE, U.S. HOUSE OF REPRESENTATIVES—Washington, D.C.
1974-1975 *Staff Director.* Legislative, oversight and investigating activities relating to telecommunications and energy.

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1969-1974 *Administrative Assistant to the Honorable Torbert H. Macdonald.* Legislative and political coordination and support.

PROFESSIONAL ACTIVITIES

Member, Federal Communications Bar Association.

TESTIMONIES

Responsive Testimony on behalf of Ameritech Indiana. Before the Indiana Utility Regulatory Commission in Cause No. 41998. *In the Matter of: Petition of Comptel, Ascent, AT&T Communications of Indiana, GP, TCG Indianapolis, and McLeodUSA Telecommunications Services, Incorporated for an Investigation into the Structural Separation of Indiana Bell Telephone Company, d/b/a Ameritech Indiana.* January 24, 2002.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Applications for Consent to the Transfer of Control of Licenses COMCAST CORPORATION and AT&T CORP., Transferors, To AT&T COMCAST CORPORATION, Transferee.	)))))))))))))))	MB Docket No. 02-70

DECLARATION OF DENNIS W. CARLTON

1. I, Dennis W. Carlton, am Professor of Economics at the Graduate School of Business of The University of Chicago. I have served on the faculties of the Law School and the Department of Economics at The University of Chicago and the Department of Economics at the Massachusetts Institute of Technology. I specialize in the economics of industrial organization, which is the study of individual markets and includes the study of antitrust and regulatory issues. I am co-author of Modern Industrial Organization, a leading textbook in the field of industrial organization, and I also have published numerous articles in academic journals and books. In addition, I am Co-Editor of the Journal of Law and Economics, a leading journal that publishes research applying economic analysis to industrial organization and legal matters. In addition to my academic experience, I am a consultant for and former President of Lexecon Inc., an economics consulting firm that specializes in the application of economic analysis to legal and regulatory issues.

2. I have been asked by SBC Communications Inc. and Qwest Communications International to review and comment on the declaration filed in this proceeding by Prof. Robert Gertner of the Graduate School of Business of the University of Chicago regarding the potential harm to competition resulting from the proposed merger of AT&T Broadband and Comcast, in light of my previous testimony in support of the elimination of regulation faced by ILECs in the provision of DSL services.[1]

3. I understand that:

- The proposed transaction combines the first and third largest operators of cable systems, which together will account for 32 percent of cable television subscribers and 26 percent of subscribers to paid video programming services in the United States.
- The proposed transaction creates the single largest provider of residential broadband Internet access services in the United States, accounting for 34 percent of cable residential broadband subscribers and 23 percent of combined cable and DSL subscribers.

4. Since the AT&T and Comcast cable franchise areas do not overlap, the transaction does not reduce the number of providers of video programming services or broadband Internet services available to any consumer and so raises no antitrust concerns regarding horizontal competition. However, even if a transaction raises no antitrust concerns regarding horizontal competition, it is well understood that it could raise vertical concerns that translate into a reduction in competition and a harm to consumers.

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1. Declaration and Reply Declaration of Kenneth Arrow, Gary Becker and Dennis Carlton, *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*: Before the Federal Communications Commission, Washington DC, Docket No. 00-185, December 1, 2000 (Declaration), and January 10, 2001 (Reply Declaration) (submitted on behalf of Verizon).

5. Professor Gertner's declaration clearly explains the economic theories under which vertical concerns could arise in this case. Professor Gertner explains how the transaction may harm competition by creating the incentive and ability of AT&T/Comcast to foreclose or otherwise disadvantage suppliers of video programming services and/or broadband Internet content services that are unaffiliated with the merged cable systems. This, in turn, can adversely affect competition in the provision of multichannel video distribution services and/or broadband Internet access services.

6. As an example of the theory explained by Professor Gertner, a transaction could adversely affect competition where carriage by a large cable operator is required for a supplier of video programming and/or broadband Internet content to realize important scale economies. Such a cable operator could be able to determine which firms will succeed in the provision of video or broadband content and can extract some of the resulting monopoly profits. By creating market power in the provision of video content, behavior of this type can raise the cost of content to other cable systems and thus harm consumers served by these systems. Similarly, such behavior can create market power in the provision of broadband Internet content. This, in turn, can disadvantage suppliers of DSL services, such as SBC and Qwest, that compete with cable modem services supplied by AT&T/Comcast.

7. The foreclosure theories of the type discussed by Professor Gertner are well-recognized in the economic literature and are the focus of substantial concern among antitrust enforcement agencies.[2] An empirical assessment of the potential adverse effect of the transaction on competition, given the limitations of available data, likely requires access to non-

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2. See, for example, M. Winston, "Tying, Foreclosure, and Exclusion," 80 American Economic Review 1 (1990); D. Carlton, "A General Analysis of Exclusionary Conduct and Refusal to Deal – Why Aspen and Kodak are Misguided," 68 Antitrust Law Journal 659 (2001); and J. Choi and C. Stefandis, "Tying, Investment and Dynamic Leverage Theory," 32 Rand Journal of Economics 52 (2001).

public information. I urge the Commission to use its investigatory powers to analyze carefully the empirical importance of the issues raised by Professor Gertner.

8. If the Commission determines that the transaction raises legitimate foreclosure-related concerns, then relaxation of regulations now faced by ILECs in the provision of DSL services is likely to reduce vertical antitrust concerns by making DSL a more potent competitive force. While I have advocated elimination of these regulations in the past for entirely different reasons, a conclusion by the FCC that the proposed transaction raised significant foreclosure concerns would only serve to heighten the rationale for elimination of these regulations.

9. Despite competition from cable modem services, which account for roughly two-thirds of mass market broadband Internet services, ILECs face a variety of FCC regulations relating to their provision of DSL services. Among other things, these regulations require ILECs to share local loops with competitive DSL providers at favored rates, provide DSL service on a wholesale basis for resale, and establish tariffs with cost-based rates.

10. Such regulations are likely to deter investment in DSL services and are likely to harm competition between DSL and cable modem services. As I have explained in other testimony before the Commission (co-authored with Kenneth Arrow and Gary Becker), elimination of the regulations that apply to DSL but not to cable modem services would likely promote competition between DSL and cable modem services. By making DSL a more potent force, foreclosure concerns associated with this transaction are mitigated. In that statement, we concluded that:

> The potential harm from application of these rules in the presence of competition between technologies is heightened due to rapid innovation in the provision of broadband Internet access. These circumstances complicate the design of efficient regulation and risk delay in the development and deployment of new services, which are important contributors to improvements in consumer welfare. Under these circumstances, competition, not regulation,

> should determine which technologies and services succeed in the marketplace.[3]

11. Elimination of these regulations would be likely to enhance the ability of ILECs to compete in the provision of broadband Internet services without raising significant risks of harm to competition. A finding by the FCC that the proposed transaction raises risk of harm to competition further reinforces the need to eliminate these rules.

12. This concludes my declaration.

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3. Declaration of Kenneth Arrow, Gary Becker and Dennis Carlton, December 1, 2000, ¶37.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on April 26, 2002.

Dennis W. Carlton

CERTIFICATE OF SERVICE

I, Daniel McCuaig, do hereby certify that on this 29th day of April, 2002, I have caused true and correct copies of the foregoing Comments of Qwest Corporation to be served by hand delivery upon the following parties:

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Commissioner Michael J. Copps
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445 12th Street, SW
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Commissioner Kevin J. Martin
Federal Communications Commission
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